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LIMITING A TAKEOVER SURETY'S LIABILITY TO THE BOND PENAL SUM

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PREFACE

This paper examines the state of the law concerning whether a takeover Surety can limit its liability to the penal sum of its performance bond. This paper does not try to tackle the more complicated question of whether a Surety should takeover its principal's work in any given situation. Instead, the authors assume that the Surety has already decided that taking over a project from a defaulted principal is in the Surety's business interests.

EXECUTIVE SUMMARY

- The long-established "general rule" is that the Surety loses the protection of the bond penal sum when it takes over its defaulted principal's project.

- Case law and respected commentators suggest that there is an exception to the "general rule" when the Surety includes in the takeover agreement an absolute limitation of liability to the penal sum of the bond.

- In an effort to protect the penal sum limitation on its liability, the Surety should include a clause in every takeover agreement that states in substance:

  The Surety's Performance Bond Liability

  The Performance Bond shall remain in full force and effect in accordance with its terms and provisions. The total liability of the Surety under this Takeover Agreement, the principal's Original Contract with obligee, and the Performance Bond for the performance of the work, after the expenditure of the Contract Balance, is absolutely limited to and shall not exceed the penal sum of the Performance Bond in the amount of $_____. All payments properly made by the Surety for the performance of the Original Contract, the Performance Bond, and this Takeover Agreement shall be credited against the penal sum of the Performance Bond. Nothing in this Agreement constitutes a waiver of the penal sum of the Performance Bond or an increase in the liability of the Surety under the Performance Bond.

INTRODUCTION

The question of whether a takeover Surety can limit its liability to the penal sum of its performance bond is of great importance to any Surety contemplating the takeover of a defaulted principal's work. Many commentators and courts suggest that the "general rule" is that once a Surety undertakes to complete a defaulted principal's work, the Surety loses the protection of the penal sum of the bond and becomes liable for all costs of completion.[1]

[1] See, e.g., BOND DEFAULT MANUAL 227 (Duncan L. Clore et al. eds., 3d ed. 2005) ("The general rule appears to be that once a surety undertakes to complete the work in question, it is liable for all costs of completion. Where the cost to complete exceeds the bond penalty plus the contract money paid to the surety, the surety's liability may exceed the penal sum of the bond."); see also 72 C.J.S. *Principal and Surety* § 101 (2006) ("[W]here a surety has the option to take over a contract and does so, the surety waives the contract's protections as his or her position as a surety and agrees to be bound as the principal and, therefore, becomes liable to pay sums in excess of the amount of the bond.").

Unfortunately, some courts have construed the general rule as inflexible[2] or have stated it without sufficient factual analysis to reasonably restrict the general rule to situations where either there is no takeover agreement between the Surety and obligee or the takeover agreement does not attempt to limit the Surety's liability to the penal sum.[3] Such imprecise statements of the "general rule" complicate a Surety's argument that it can limit its liability to the penal sum in the takeover agreement. More reasoned decisions express a narrower application of the "general rule" and restrict their holdings to situations where a Surety has not tried to limit its liability to the bond penal sum upon takeover.[4] The Surety and its counsel must be aware of and able to distinguish the imprecise decisions, because it is very likely the obligee will cite to such rulings.

ANALYSIS

Case law addressing a takeover Surety's liability can be somewhat confusing for courts and practitioners. It is not as developed as more settled principals of Surety law. In fact, there are cases to support several mutually exclusive positions on the issue of whether a Surety can effectively limit its takeover liability to the penal sum of the performance bond. For example, Egyptian American Bank, S.A.E. v. United States, 13 Cl. Ct. 337 (Cl. Ct. 1987), and People ex rel. Ryan v. Environmental Waste Resources, Inc., 782 N.E.2d 291 (Ill. 3d Dist. Ct. App. 2002), hold that the Surety's liability is limited to the bond penal sum even upon takeover, while Village of Fox Lake v. Aetna Casualty and Surety Co., 534 N.E.2d 133 (Ill. 2d Dist. Ct. App. 1986), holds that despite incorporation of the bond penal sum liability limit into the takeover agreement, the Surety's liability may exceed the bond penal sum.

The great majority of decisions hold that a Surety is liable in excess of its bond penal sum where it takes over a project without entering into a takeover agreement with the obligee that limits the Surety's liability to the bond penal sum.[5] Many of those same cases make clear

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[2] See, e.g., East Quincy Servs. Dist. v. General Accident Ins. Co. of Am., 88 Cal. App. 4th 239, 245 (Cal. 3d Dist. Ct. App. 2001) ("A more important principle than subrogation is that once a surety assumes the contract of its principal, it stands in the same position to the contract as the principal, *including all liabilities*; a surety is thus . . . no longer limited to its bond in completing the contract thereafter.").

[3] See, e.g., McWaters & Bartlett v. United States ex rel. Wilson, 272 F.2d 291, 295 (10th Cir. 1959) ("[The Surety] took over [the principal]'s [construction] contract and agreed to complete it. That would, of course, subject [the Surety] to full liability for all amounts incurred in furnishing labor and material in the completion of the job, irrespective of the . . . [penal sum] liability limitation in its bond. The court, accordingly correctly concluded, as a matter of law, that by such action [the Surety] waived the penalty limitation of its bond.").

[4] See International Fid. Ins. Co. v. County of Rockland, 98 F. Supp. 2d 400, 423 (S.D.N.Y. 2000) ("Because, under that takeover contract, the surety changes its role to that of a contractor, it will be liable, as all construction contractors are, for all damages that flow naturally from the breach . . . **unless it negotiates, as an element of the takeover agreement, some limitation to those responsibilities**.") (emphasis added); Caron v. Andrew, 284 P.2d 544, 550 (Cal. 3d Dist. Ct. App. 1955) ("[The Surety] stepped into its principal's shoes and . . . undertook to complete its principal's contract without in any way seeking to protect itself by exacting . . . conditions which would or might make its undertaking less burdensome.").

[5] See International Fid. Ins. Co., 98 F. Supp. at 428 ("[L]ong-established case law holds that a surety's takeover of its principal's contract pursuant to a performance bond always subjects the surety to liability beyond the penal sum of its bond."). But see Egyptian Am. Bank, S.A.E. v. United States, 13 Cl. Ct. 337, 341 (Cl. Ct. 1987) ("Under the Federal Procurement Regulations, a surety may complete the contract itself or allow the government to find a new contractor and pay the government the expense of completion. . . . **Whatever its choice, a surety is responsible for the expense of completion up to the applicable bond limit**.") (emphasis added); People ex rel. Ryan v. Environmental Waste Res., Inc., 782 N.E.2d 291, 296-97 (Ill. 3d Dist. Ct. App. 2002) **("[W]e hold that [the Surety]'s liability, should it choose to perform closure and post-closure activities, is limited to the amount of the penal sum of the bond.** The [obligee] asserts that as a matter of public policy, if [the Surety]

that a limitation of the Surety's liability in the takeover agreement would be a material fact that could change their holdings.[6] In addition, commentators have almost universally adopted the position that a Surety can limit its takeover liability to the bond penal sum by an express limitation in the takeover agreement with the obligee.[7] Therefore, where a Surety takes over a project and enters into a takeover agreement that expressly and absolutely limits the Surety's liability to the penal sum of the bond, the Surety's liability to the obligee is limited to the penal sum of the bond. Decisions that appear to support the opposite conclusion are either anomalous or distinguishable.[8]

A Surety should negotiate for the inclusion, in any takeover agreement with the obligee, of a clause that absolutely limits the Surety's liability to the penal sum of the performance bond. In substance, the liability limiting clause should state:

> **The Surety's Performance Bond Liability.**
> The Performance Bond shall remain in full force and effect in accordance with its terms and provisions. The total liability of the Surety under this Takeover Agreement, the principal's Original Contract with obligee, and the Performance Bond for the performance of the work, after the expenditure of the Contract Balance, is absolutely limited to and shall not exceed the penal sum of the Performance Bond in the amount of $_____. All payments properly made by the Surety for the performance of the Original Contract, the Performance Bond, and this Takeover Agreement shall be credited against the penal sum of the Performance Bond. Nothing in this Agreement constitutes a waiver of the penal sum of the Performance Bond or an increase in the liability of the Surety under the Performance Bond.

As one commentator has suggested,[9] the Surety cannot compel the obligee to accept a liability limiting clause as part of the takeover agreement. Some commentators suggest that the Surety strongly consider its other options if the obligee will not agree to the inclusion of such a limitation in the takeover agreement.[10] Just as the Surety cannot compel the obligee to

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chooses to perform closure and post-closure activities, it must pay the entire cost, even if the cost exceeds the penal sum amount of the bond. . . . However, interpreting the contract as the [obligee] desires would require us to create an exception to the long-standing law relating to sureties [that a Surety is bound by the terms of its bond]. This we decline to do. The appropriate governmental body to make the change the [obligee] desires is the legislature.") (emphasis added).

[6] See *surpa* note 4.

[7] 72 C.J.S. *Principal and Surety* § 83 ("Where a surety assumes the role of the principal and completes the contract, the surety is also liable to pay sums in excess of the penal sum, **unless the contract between the surety and the principal contains specific language stating that the obligation of the surety will not exceed the amount of the penal sum of the bond**.") (emphasis added); 4 BRUNER & O'CONNOR CONSTRUCTION LAW § 12:21 (2006) ("[T]akeover agreements are often carefully negotiated by sureties to preserve the protection of the bond amount."); 4 BRUNER & O'CONNOR CONSTRUCTION LAW § 12:79 ("Without agreement of the obligee in the takeover agreement, the surety's promise to complete constitutes a waiver of the bond limit."); Bruce C. King, *Takeover and Completion of Bonded Contracts by the Surety*, 27-FALL Brief 22, 27 (1997) ("To avoid liability in excess of the bond amount . . . the surety must include a clause in the takeover agreement which limits the surety's liability in the course of performance to the original bond penalty.").

[8] See *infra* Appendix: Case Law Rundown.

[9] King, 27-FALL Brief at 27 ("[T]he obligee is not required to accept such a limitation.").

[10] See, e.g., BOND DEFAULT MANUAL 228 ("If the obligee refuses to concede the point and limit the surety's liability to the bond penalty, the surety should seriously consider its other options.").

agree to a liability limitation, the obligee cannot compel the Surety to takeover the project. However, as this paper's key assumption is that the Surety has already decided that takeover is in its business interests, this paper will suggest arguments that may convince the obligee to accept the limitation as part of the takeover agreement.

The Surety has significant bargaining power it may use to convince an obligee to accept a liability limiting clause in a takeover agreement. On a public project, the Surety's leverage will be greatest because the public owner/obligee will have to put the completion specifications out to bid if the Surety does not takeover the project. The Surety should call the obligee's attention to the delay the project will experience if the completion contract has to be drawn up and put through the competitive bidding process. Emphasis on the potential downside from that delay can be tailored to the project; *e.g.*, in central Florida, you need to get your building dried in before the summer thunderstorms. A veiled threat to tender the penal sum unless the obligee agrees to limit the Surety's liability in the takeover agreement may convince the public owner/obligee to agree in order to avoid delay and get the project done.

On a private project, the Surety will probably not have as much leverage against the owner/obligee because there is no requirement for competitive bidding of the completion specifications. However, on both public and private projects, it is safe to assume the owner/obligee would prefer not to have to deal with the hassle of analyzing the project status, interviewing completion contractors, reviewing bids, etc. The Surety can emphasize its experience managing and finishing out construction projects. Further, the Surety should explain its interest in completing the project to the obligee's satisfaction under budget. If the obligee is worried about the Surety wasting the penal sum while not completing the principal's scope of work, the Surety can reason that it does not make logical sense for the Surety to waste the penal sum because, in taking over the project, the Surety will incur significant internal administrative expenses that cannot be recovered. If the Surety intended to expend the penal sum, the Surety would simply tender it to the obligee.

The Surety must be careful to quickly resolve the takeover question because if the Surety cannot reach agreement with the obligee and decides to tender the penal sum, it may become liable for the damages arising from any unreasonable delay.[11]

CONCLUSION

Case law and commentary indicate that a takeover Surety can limit its liability to the penal sum of the bond only if it includes an absolute limitation clause in the takeover agreement with the obligee. While the law in this area is not as settled as other areas of Surety law, any Surety taking over a defaulted principal's project should negotiate for the inclusion of a liability limitation in the takeover agreement.

[11] See, e.g., Insurance Co. of N. Am. v. United States, 951 F.2d 1244, 1246 (Fed. Cir. 1991) ("[I]f a surety delays payment beyond proper notification of liability, interest accrues on the debt. This interest may cause the surety's obligation to exceed the penal sum of the bond."); Laramore v. Laramore, 64 So. 2d 662, 669 (Fla. 1953) ("[W]here by his neglect or misconduct the surety prolongs the payment beyond the date it should be made, interest may be collected against him by way of damages for the delay, even though the aggregate amount of principal and interest exceeds the penal sum of the bond.").

APPENDIX: CASE LAW RUNDOWN

I. International Fid. Ins. Co. v. County of Rockland, 98 F. Supp. 2d 400, 423 (S.D.N.Y. 2000).

> Because, under that takeover contract, the surety changes its role to that of a contractor, it will be liable, as all construction contractors are, for all damages that flow naturally from the breach . . . unless it negotiates, as an element of the takeover agreement, some limitation to those responsibilities.

International Fidelity Insurance clearly supports the idea that a negotiated limitation of liability to the penal sum as part of the takeover agreement will be enforceable. The court points out that the takeover agreement failed to contain "an absolute limitation on liability to the penal sum of the bond," and on that basis concluded that the Surety's liability was not limited to the penal sum of the bond.

II. People ex rel. Ryan v. Environmental Waste Res., Inc., 782 N.E.2d 291, 294, 296-97 (Ill. 3d Dist. Ct. App. 2002).

> [The Surety] . . . filed a motion for summary determination of its liability under the surety [bond] with [its principal]. It asked the court to determine whether, if it chose to perform closure and/or post-closure activities as permitted by the contract, it would be liable for the total cost of the activities, even if that amount exceeded the penal bond amount.
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> The fundamental principle of surety law is that the surety is bound by the terms of its [bond]. Surety [bonds] are to be strictly construed.
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> Here, the [bond] on its face sets the maximum liability of [the Surety] at approximately $1.24 million. The [bond] further states that if [the Surety] makes any payment or series of payments, it is not discharged from liability until it has paid out an aggregate amount equal to the penal sum of the bond. Furthermore, the [bond] states that "in no event" shall the amount of [the Surety]'s liability exceed the penal sum of the bond. Based on this language in the contract and the long accepted principles of surety law, we conclude that the court erred in determining that [the Surety] faces potential liability that exceeds the penal bond amount if it chooses to perform closure and/or post-closure activities. Therefore, we hold that [the Surety]'s liability, should it choose to perform

> closure and post-closure activities, is limited to the amount of the penal sum of the bond.
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> The [obligee] asserts that as a matter of public policy, if [the Surety] chooses to perform closure and post-closure activities, it must pay the entire cost, even if the cost exceeds the penal sum amount of the bond. It argues that such a policy would prevent a surety from beginning environmental work and then abandoning it before the work is finished because the penal amount has been expended. However, interpreting the contract as the [obligee] desires would require us to create an exception to the long-standing law relating to sureties. This we decline to do. The appropriate governmental body to make the change the [obligee] desires is the legislature.

(Citations omitted.)

The Ryan court's holding is that the Surety's liability is limited to the penal sum of the bond even where the Surety takes over the project and irrespective of any takeover agreement.

III. Egyptian Am. Bank, S.A.E. v. United States, 13 Cl. Ct. 337, 341 (Cl. Ct. 1987).

> Upon default of the underlying contract between the principal and the beneficiary, the surety steps into the shoes of its principal. The surety assumes primary responsibility for the completion of the contract. Under the Federal Procurement Regulations, a surety may complete the contract itself or allow the government to find a new contractor and pay the government the expense of completion. . . . Whatever its choice, a surety is responsible for the expense of completion up to the applicable bond limit.

Egyptian American Bank involved a bank attempting a fairly clumsy foray into guarantee and Suretyship. The court determined that the bank was not a Surety based on the language of its letter of guarantee, which renders the above-cited language dicta and limits Egypt American Bank's precedential value. However, the above-cited language clearly supports the proposition that the protection of the penal sum limit applies where the Surety takes over a project. Though Egypt American Bank's holding contradicts the majority view, it may be used to bolster the enforceability of a liability limit clause in a takeover agreement.

IV. U.S. ex rel. Maris Equip. Co. v. Morganti, Inc., 163 F. Supp. 2d 174, 194 (E.D.N.Y. 2001).

> A takeover by the surety of its principal's contract pursuant to a performance bond will subject the surety to liability beyond the penal amount of the bond. In contrast, even when a surety advances large sums of money to the contractor and becomes "intimately involved" in the contractor's financial affairs, the surety will not, without more, face exposure beyond the parameters of its bond.

(Citation omitted.)

Morganti's opinion on a takeover Surety's liability is not helpful, but it is dicta. However, you may find the opinion useful should you be confronted with an assertion that a Surety loses the protection of the penal sum of its bond when the Surety finances a defaulted principal through project completion.

V. Caron v. Andrew, 284 P.2d 544, 549-50 (Cal. 3d Dist. Ct. App. 1955).

> If . . . upon breach by the principal [the Surety] elects to and is permitted under the contract or by permission obtained after breach to step into the place of its principal and perform that principal's contract, it then makes itself subject to the principal's liabilities. . . .
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> Under the findings of fact made by the trial court, hereinbefore recited, [the Surety], by entering upon the work, assuming the contract of the principal and undertaking to complete it after the principal's breach, rendered itself liable for damages proximately flowing from its own succeeding breach, and this without limitation as to amount. It stepped into its principal's shoes and, as the court found, undertook to complete its principal's contract without in any way seeking to protect itself by exacting extensions of time or other conditions which would or might make its undertaking less burdensome.

Caron is often cited in support of the proposition that the Surety that takes over a project upon its principal's default loses the protection of the bond penal sum liability limit. However, it should be noted that the court restricted its ruling to "the findings of fact made by the trial court." Caron is only precedent or instructive if the facts of your takeover echo those in Caron.

The Surety in Caron did not try to limit its liability to the penal sum in any express way when taking over the project. If a Surety is able to secure a limit of liability to the bond penal sum in the takeover agreement, Caron becomes immediately and obviously distinguishable.

In addition, when one reviews the Surety's conduct in Caron, it becomes clear that there were significant issues of equity. The facts show that the Surety badly managed the project takeover. The project was a $52,000 leveling job that the principal agreed to finish in a total of 5 months. The penal sum of the bond was half the contract price, $26,000. After the principal worked for 2.5 months, it abandoned the project. The Surety stepped in and took over the project, worked for an additional 4 months and then abandoned the project, having expended the penal sum of the bond. With project completion already running 1.5 months late, the obligee had to pay a completion contractor $29,000 to finish the project. The court took those facts as showing that the Surety wasted the bond penal sum and the obligee's time. The alternative is that the obligee significantly overpaid the principal; in that case, the Surety's mistake would have been not hiring (or, at that time, employing) very good consultants.

VI. Village of Fox Lake v. Aetna Cas. & Sur. Co., 534 N.E.2d 133, 145-147 (Ill. 2d Dist. Ct. App. 1989).

> In its third contention the [obligee] argues that the trial court erred in finding that [the Surety]'s liability to the [obligee] did not exceed the penal amount of [the Surety]'s performance bond since [the Surety] did not effectively reserve its rights to be obligated for no more than the bond penalty. We agree.
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> [The Surety] had two alternatives when the [obligee] terminated [the principal]'s contract: "take over and perform the contract" or refrain from performing and allow the [obligee] to take over the work and complete the contract. If [the Surety] chose the latter alternative, it would, under the terms of section 23, be liable for any excess costs, i.e., [the Surety] would be liable for more than the amount of the penal bond. If [the Surety] chose the first alternative, it might likewise be liable for more than the penal bond if, in performing the contract, the cost of the performance totaled more than the sum of the bond. . . . If the surety elects to perform the work, it puts itself in the place of the contractor and becomes liable for the cost to complete the work regardless of the amount of the bond.
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> According to [the Surety], the reservation of its rights as set forth in this letter proves it did not take over [the principal]'s role but, instead, elected to complete the construction work as if the [obligee] itself were completing it. . . . Nevertheless, even if by its reservation of rights [the Surety] was reserving its right to be liable to the [obligee] only in the amount of the performance bond, that reservation constituted a

> modification of section 23 of the contract for which there was no consideration. [The Surety] asserts that its agreement to perform the construction work was consideration for the [obligee]'s agreement to allow [the Surety]'s reservation of rights. However, under the terms of the contract, which have been shown to be part of the performance bond, [the Surety] was already obligated to perform the work. A promise to do something which one is already legally obligated to do is no consideration and creates no new obligation. Here, the benefit derived from [the Surety]'s attempted modification of the contract was unilateral, inuring to the benefit of [the Surety] only. The [obligee] gained nothing, and, consequently, there was no modification of the contract since consideration was lacking.

(Citations omitted.)

Opponents will cite the Fox Lake opinion for the proposition that a takeover Surety cannot limit its liability in any way. A similar decision, which opponents may also cite, is Plaquemines Parish Government v. River/Road Construction, Inc., 828 So. 2d 16 (La. 4th Cir. Ct. App. 2002). Plaquemines, is distinguishable because it was decided under the Louisiana civil code, which allows judicial modification of a bond penal sum if the court finds it so disproportionate as to be contrary to public policy. 828 So. 2d at 29 ("Article 2012 thus gives legislative sanction to the judicial prerogative to modify stipulated damages clauses, but it limits and channels that discretion to situations in which the stipulated damages are so disproportionate as to be contrary to public policy. The main tenet of Article 2012 is in harmony with classic civilian theory, and it is consistent with the solution adopted in modern codes and followed by recent Continental jurisprudence.").

The court in Fox Lake held that the Surety was obligated under the bond to complete its defaulted principal's work. 534 N.E.2d at 147. The court also held that the Surety had the "right", as opposed to the obligation, to takeover the project. Id. at 139. Those two statements are incompatible, which indicates that Fox Lake was incorrectly decided. If the Fox Lake court were correct, there could never be an enforceable takeover agreement because the court would find what it labeled a lack of consideration in every takeover agreement.

VII. Employers Mut. Cas. Co. v. United Fire & Cas. Co., 682 N.W.2d 452, 457 (Ia. Ct. App. 2004).

> When a surety assumes the performance of the contract, the surety becomes subrogated to the rights of the principal, and necessarily becomes subject to the principal's liabilities.
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> In the present case, after [its principal]'s default, [the Surety] took the option of taking over Janning's performance under

> the contract. By taking over the contract, [the Surety] waived its protections as a surety and agreed to be bound as the principal. When [the Surety] assumed the role of the principal, it became liable to pay sums in excess of the amount of the bond.

The language in Employers Mutual is obviously not helpful. The case is distinguishable, however, because the settlement agreement (takeover agreement) between the Surety, principal, and obligee specifically provided that there was no waiver of the bond agreement only as between the Surety and principal. The court interpreted that provision to be an implied waiver of the bond as between Surety and obligee. It is not completely clear from the decision that the court did not misunderstand a reference to the GAI as a reference to the bond. One could argue based on this latter point that Employers Mutual's instructive value is suspect because the court's decision reveals a misunderstanding of Surety principals and law.

VIII. Copeland Sand & Gravel, Inc. v. Insurance Co. of N. Am., 596 P.2d 623, 625 (Or. Ct. App. 1979).

> [W]hen the principal defaults or fails to perform, the surety may, where permitted by contract or with the acceptance of the other party to the principal contract, assume the role of its principal for purposes of performing the obligation which it has bonded. When the surety does so, it becomes responsible for performance of the principal contract and for all obligations incurred in connection with performance, notwithstanding the limits of liability in the bond.

Copeland Sand is distinguishable because the Surety did not enter into a takeover agreement and therefore did not have a clause limiting liability to the penal sum of the bond. Instead, the Surety took an assignment of the contractor's rights, directed the owner/obligee to make all future contract payments to the Surety, and the Surety contracted with and paid the completion subcontractors. The Copeland Sand court found that the Surety had assumed the construction contract by its actions. Id. ("The Combination of INA's acceptance of the assignment of rights from R & W, its acceptance of payments from the city under the principal contract, and its engaging and paying a subcontractor for continued performance of the original contractor's duties under that contract all of which the evidence shows and INA does not dispute occurred had the legal effect of making INA the contractor in place of R & W.").

Because the Surety assumed the construction contract, the court held that the Surety's liability was the same as the principal's under the construction contract and was not limited by the protection of the bond.

IX. McWaters & Bartlett v. U.S., 272 F.2d 291, 295 (10th Cir. 1959).

> [The Surety] took over [the principal]'s [construction] contract and agreed to complete it. That would, of course, subject

> [the Surety] to full liability for all amounts incurred in furnishing labor and material in the completion of the job, irrespective of the $69,000 liability limitation in its bond. The court, accordingly correctly concluded, as a matter of law, that by such action [the Surety] waived the penalty limitation of its bond.

The McWaters court did not provide a detailed factual recital or analysis. It may be argued that McWaters supports the proposition that a Surety waives the protection of the penal sum liability limitation of its bond when it takes over a project from its defaulted principal, but the authors would argue there is an insufficient factual recital to give context to any legal conclusions.

X. East Quincy Servs. Dist. v. General Accident Ins. Co. of Am., 88 Cal. App. 4th 239, 245 (Cal. 3d Dist. Ct. App. 2001).

> A more important principle than subrogation is that once a surety assumes the contract of its principal, it stands in the same position to the contract as the principal, *including all liabilities*; a surety is thus . . . no longer limited to its bond in completing the contract thereafter.

The language of East Quincy shows that the court was not sympathetic to the Surety industry. However, the ruling in East Quincy is distinguishable because there was no takeover agreement with the obligee.